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NO. 80-1290

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

WILLIAM P. CLEMENTS, JR., Governor
of the State of Texas, et al.,

Appellants,

v.

JOHN L. FASHING, et al.,

Appellees.

On Appeal from the
United States Court of Appeals
for the Fifth Circuit

Brief Amicus Curiae on Behalf of Appellees

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The County Court at Law Judges Association of the State of Texas has obtained the written consents of the attorneys for both the appellants and appellees to the filing of the attached brief amicus curiae. The consents have been filed with the Clerk.

INTEREST OF AMICUS CURIAE

The members of the County Court at Law Judges Association of the State of Texas are persons whose access to Texas state and federal elective offices was seriously burdened by art. XVI, § 65 of the Texas Constitution, which was declared invalid by the United States District Court for the Western District of Texas in this case. The political and personal interest of the Association and its members is substantial.

To the Association's knowledge neither the appellants or appellees in this case have presented any argument to either the District Court or the Court of Appeals that art. XVI, § 65 of the Texas Constitution constitutes a bill of attainder, and as such violates U.S. Constitution article I, § 10, cl. 1. The appellants suggest this analogy by their arguments in justification of art. XVI, § 65.

The Association also contends that if this Court not find art. XVI, § 65 to be punitive and in the nature of a bill of attainder, but instead find it to be merely regulatory, then as a regulation it raises what is in effect an irrebuttable presumption which denies due process.

Finally, the Association contends this Court should apply the same standard of review to this interference with candidacy that it applies to regulation of voting, political association, and political speech. Although this has been raised by the appellants, they have not fully explored the relationship of candidacy to other election rights. [Appellants' Jurisdictional Statement (p. 7, 9); Appellants' Brief (4,6)].

SUMMARY OF ARGUMENT

Appellants ask this Court to defer to the legislative determination represented by

art. XVI, § 65 of the Texas Constitution which was struck down by the U.S. District Court. Amicus argues that in their arguments defending the classification scheme of this provision they unintentionally show it to be an unconstitutional denial of due process falling between the categories of bills of attainder and impermissible irrebuttable presumptions. If this Court should find the classification scheme is not justified, they argue that Texas may regulate candidacy piecemeal because candidacy is not a fundamental right. Amicus argues it is the election process itself which is constitutionally fundamental and that election rights take their character from that process. Amicus urges that this Court's constitutional responsibility requires it to review with a single rigorous standard every election regulation challenged as a legislative threat to basic freedoms.

ARGUMENT

The overriding issue in this case is not whether Texas may regulate elections or how it must do so. Rather the central inquiry is the degree of care which the United States Constitution imposes on Texas in the context of the concerns for separation of powers and federalism.

At issue in this case is the Constitutional legitimacy of that portion of art. XVI, § 65 of the Texas Constitution which automatically deprives the holders of some, but not all Texas public offices of their offices if they become candidates or announce that they are candidates for an office other than the office they hold.

The State of Texas may legitimately determine that these offices be filled by election. Texas may, and, indeed has a duty to, regulate elections. Texas may set qualifications for candidates and office-

holders. Texas may prohibit the holding of more than one office simultaneously. Texas may prohibit an officeholder from engaging in partisan political activity during the term of office holding. Texas may prohibit the use of the office for political purposes. Texas may define and prohibit misconduct or abuse by officeholders. Texas may enforce such prohibitions as these with appropriate sanctions appropriately applied. All these things Texas may do, if it does them in ways which are fundamentally fair. Amicus urges that art. XVI, § 65 is unreasonable and unfair and that from its effects it can be inferred that it is the product of a legislative process unacceptably careless of fundamental liberties guaranteed by the U.S. Constitution.

The most basic idea of fairness requires that persons in like circumstances

be treated in a like manner. However, circumstances which superficially appear alike may, with a closer view, disclose differences which legitimate different treatment. In this case, the U.S. District Court found that state offices which are similar--district court judgeships and judgeships of the county courts of law--are treated differently. The holder of a state district court judgeship does not automatically resign that lose his office by announcing candidacy or by becoming a candidate for an office other than district court Judge. However, the instant the holder of a judgeship of the county court at law announces candidacy or becomes a candidate for another office, the holder automatically resigns his office. The U.S. District Court reasoned that if the different treatment of judges of county courts at law under art. XVI, § 65 was related to

some difference in these offices it could be upheld.

Based on the testimony of the defendants-appellants (J.A.6.), the District Court found the following purposes for art. XVI, § 65: (1) the prevention of abuse by office holders; (2) the compulsion of office-holders to give their undivided attention to their offices; (3) the elimination of appearances of impropriety; and (4) the prevention of interest conflicts (J.A. 18). Because these purposes were equally appropriate to district court judges and judges of the county courts of law, the U.S. District Court concluded it was irrational to treat what were like circumstances in a different manner. (J.A. 18) Amicus urges this Court to affirm this judgment. To deny the District Courts conclusion implies finding which are Constitutionally unacceptable.

Appellants argue alternatively that the District Court's finding of similarities is wrong and, even if it is correct, Texas may treat like classes of offices differently.

I

Directly challenging the decision of the U.S. District Court, the appellants assert that the classification scheme of art. XVl, § 65 has a rational basis. They say that the officeholders burdened by art. XVl, § 65 are, as a matter of fact, more likely to abuse their positions when seeking election to other offices than other officeholders. (Appellants' Brief, pp. 9, 14, 15) They describe art. XVI, § 65 as a legitimate deterrent of official misconduct (Appellants' Brief 9, 14, 15). [Some of the offices not burdened by Article 16, Section 65 have the same burden imposed by art. XI, § 11 of the Texas Constitution. An important example is the office of municipal judge

(Appellants' Brief p. 16).] Appellants concede that many significant offices exist whose holders are not burdened (Appellants' Brief p. 14-16). Appellants' implication is that if "county level officeholders" are susceptible to temptations and consequently in need of deterrence, the holders of offices not so burdened are somehow inherently less susceptible.

In effect appellants ask this Court to presume a rational basis for the classification scheme at issue, in the absence of any legislative history, because there might have been a legislative determination that deprivation of office is necessary to deter a "tainted" class of officeholders from future misconduct. Appellants' argument nearly supports an inference that art. XVI, § 65 functions as a bill of attainder. See Nixon v. Administrator of General Services 433 U.S. 425, 475-476 (1977). The only element missing is the requirement that

bills of attainder be imposed on a named individual or easily identifiable members of group; this measure burdens the holders of such diverse offices as inspectors of hides and animals, county surveyors, and judges of county courts at law (Appellees' Motion to Affirm p. 5). Appellants attempt to identify a "tainted" class by labeling the offices burdened by Article 16, Section 65 as "county officeholders" (Appellants' Brief pp. 4, 14-16). There is no reference to "County officeholders" in art. XVI, § 65, but if it could be assumed that the class, "county officeholders," was sufficiently specific, the punitive character of art. XVI, § 65 is well established by appellants. Thus art. XVI, § 65 would be unconstitutional as a bill of attainder prohibited by art. I, § 10, cl. 1 of the United States Constitution.

If appellants have not shown every element of a functional bill of attainder,

appellants still may have made an argument sufficient to warrant a second analogy: art. XVI, § 65 raises a "permanent irrebuttable presumption" of the type "long disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments" Cleveland Board of Education v. LaFleur 414 U.S. 632, 644 (1974).

There is a single constitutional theme recurring in bills of attainder and impermissible irrebuttable presumptions: such measures infringe on the realm of competence which the separation of powers doctrine reserves to the judiciary. Regulations struck down under these principles ordinarily penalize individuals without judicial proceedings in the first instance, or judicial review. Bills of attainder can be reasonably characterized as aggravated impermissible irrebuttable presumptions. The Fifth and Fourteenth

amendments guaranteeing due process certainly were intended to extend not limit due process rights guaranteed by the Bill of Attainder clause.

Art. XVI, § 65 requires that holders of certain state offices cannot be candidates for other offices without abusing the powers of their office; misappropriating public funds, property or servants under their control; or neglecting the duties of their offices. [It is never made clear why incumbents seeking re-election would not be prone to engage in such misconduct, yet they are not automatically deprived of their offices by announcing their intention to stand for re-election (art. XVI, § 65)].

The right to choose to be a candidate for public office is at least a substantial right to be balanced against the interests which appellants say are served by art. XVI, § 65. (Appellants' Brief pp. 4, 6). Alternative means of securing these interests are

available, making the infringements of this article unnecessary to the achievement of the legitimate goals advanced by appellants. Offenses constituting official misconduct are defined by Title 8, Chapter 39 of the Texas Penal Code and include all of the activities which art. XVI, § 65 is supposed to deter except neglect of office. Article 2.03 of the Texas Code of Criminal Procedure provides that neglect or failure by an officer to perform duties shall be presented by information or indictment (when appropriate) to a court having jurisdiction. Additionally, electors may turn out of office abusive or neglectful officials. (See Appellants' Brief p. 6)

Thus to accept the arguments offered by appellants to support their assertion of the existence of a rational basis for the classification scheme of art. XVI, § 65 is to deny or at least momentarily forget two

important strands of this Court's jurisprudence concerning constitutional limits on legislation.

II.

Appellants' second argument does not challenge the District Court's finding that offices burdened by art. XVI, § 65 and unburdened offices are equally susceptible to the abuses which the measure is supposed to deter. Appellants' responses to interrogations concede as much (J.A. p. 6). Appellants excuse the lack of a rational basis for the classification by saying that Texas is not constitutionally bound to legislate against abuses comprehensively and simultaneously. (Appellants' Brief p. 11).

Appellants' argued conclusion,--that this Court should defer to the legislative judgment embodied in art. XVI, § 65--simply does not follow from appellants' accurate observation that to date this Court has

declined to declare candidacy a fundamental right. In the middle of their argument appellants concede that art. XVI, § 65 could reasonably be reviewed by this Court to see if the classification scheme passes a more difficult test than mere rationality, that is, the standard proposed by the United States Court of Appeals for the Fifth Circuit in the case of Morial v. Judiciary Commission of the State of Louisiana 565 F2d 295, 304 (1977). Appellants say this Court could decide the issue by answering the question: is the regulation "reasonably necessary for the protection of the interests of the state?" (Appellants' Brief p. 11). By conceding the appropriateness of the Morial standard, appellants also concede that the only right which they believe to be at issue, candidacy, is something more than a non-fundamental right. Amicus agrees and urges the court to declare a single rigorous

standard of review to be appropriate in every aspect of election regulation.

Except for association and speech, election rights are not inherently fundamental. Voting and candidacy implement a process which is itself politically fundamental i.e., it involves the presuppositions upon which even the United States Constitution is based. Central to this process is the notion that individual political freedom is the essence of social and political order.

By establishing a republic with limited and defined powers the founders meant to protect what this Court has described as the "potential fluidity of American political life" American Party of Texas v. White, 415 U.S. 767, 787 (1974). Neither did they imagine that a society could exist without effective government. In Federalist No. 37

James Madison wrote:

> Among the difficulties encountered by the convention, a very important one must have lain in combining the requisite stability and energy in government with the inviolable attention due to liberty and to the republican form. The Federalist Papers 226 (C. Rossiter ed. 1961).

This Court has the gravest kind of responsibility in cases such as this one because the assertion than an election right has been wrongly infringed is an assertion that the continued existence of the United States as a representative republic is endangered by an act of the representatives themselves. A real fear of the Founders was the propensity of popular governments to self destruction when a faction managed to vote to itself a proprietary title to the republic. See The Federalist Papers, No. 39, 241 (C. Rossiter ed. 1961). The Founders gave this Court its responsibility to the Constitution because they feared that the other

branches would not always fulfill their own Constitutional obligations to it.

The protection of free association and speech is esential to popular government. A representive republic requires, in addition, the protection of voting and candidacy. Choosing representatives necessarily means counting votes, but voting is not an end in itself. Similarly if this Court were to declare candidacy a fundamental right, candidacy could not be an end in itself. To have the right to vote or be a candidate without the right to speak to others to encourage their association in a campaign would be a cruel mockery of the republican form. They are inextricably interwined.

Maintaining candidacy as an important but not fundamental election right has the undesirable effect of suggesting that some aspect of elections is less important than others and that legislative acts which

regulate it do not require the same painstaking as acts regulating voting, association, or political speech.

The principles of federalism and deference to legislative determinations do not preclude this Court from requiring that a high degree of care be taken when such a fundamental process as elections is regulated.

CONCLUSION

For all the foregoing reasons, Amicus urges this Court to affirm the decision of the Court of Appeals in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Brief Amicus Curiae was served on the parties, James P. Allison, Assistant Attorney General, P.O. Box 12448, Capitol Station, Austin, Texas 78711; Raymond C. Caballero, 521 Texas Avenue, El Paso, Texas 79901, by registered mail.

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